

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Acadia Insurance Company, as Subrogee of St. Paul Street, LLC)	Civil Action No. 04-12557-WGY
Plaintiff)	U.S. DISTRICT COURT DISTRICT OF MASS.
)	
v.)	
)	
)	
NER Construction Management, Inc.)	
Defendant)	

**DEFENDANT, NER CONSTRUCTION MANAGEMENT, INC.'S,
STATEMENT OF MATERIAL FACTS OF RECORD IN SUPPORT OF
ITS MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR
FOR SUMMARY JUDGMENT**

Defendant, NER Construction Management, Inc. [NER], pursuant to, and in accordance with, Local Rule 56.1, submits its statement of the material facts of record, as to which it contends there is no genuine issue to be tried, in support of its motion for judgment on the pleadings and/or summary judgment dismissing the complaint against it.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On or about April 16, 2003, St. Paul Street LLC [St. Paul] entered into a contract with Suffolk Construction Co., Inc. [Suffolk] as general contractor to build St. Paul Street Residences project in Brookline, Massachusetts. A copy of the pertinent portions of the contract is attached hereto, marked exhibit "A" and incorporated herein.

2. On or about August 14, 2003, the defendant, NER, was hired as subcontractor by Suffolk.

3. On or about January 31, 2004, a fire started in the basement of the project.

Complaint, ¶ 10.

4. The cause of this fire is still unknown. Complaint, ¶ 11.

5. At the time of the incident, on or about January 31, 2004, St. Paul had in force and effect a policy of insurance with the Acadia Insurance Company. [Acadia]. Complaint, ¶ 2.

6. As a result of the incident of January 31, 2004, Acadia, as insurer, paid St. Paul "in excess of \$75,000.00" to reimburse St. Paul for damage to property involved in the project. Complaint, ¶ 13.

7. The above captioned action has been commenced by Acadia to recover amounts paid by it to St. Paul pursuant to the subject property insurance policy for claims arising as a result of the incident on January 31, 2004.

8. Suffolk and St. Paul's contract provided, in pertinent part:

11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of the subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's Consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

9. The contract referenced in ¶ 8 above, including ¶ 11.4.7 "Waivers of Subrogation," was in full force and effect on the date of the incident on January 31, 2004.

NER CONSTRUCTION MANAGEMENT, INC.
By Its Attorney,



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Dated: October 7, 2005